

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAWN J. DUNCAN,

Plaintiff,

v.

WELLS FARGO HOME MORTGAGE,
et al.,

Defendants.

2:11-CV-864 JCM (PAL)

ORDER

Presently before the court is defendants Wells Fargo Home Mortgage's and National Default Servicing Corporation's motion to dismiss. (Doc. #5). Also before the court is pro se plaintiff's motion to amend the complaint (doc. #9), contained within plaintiff's response to defendants' motion to dismiss.

1. Motion to Dismiss

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Untenable legal conclusions, unsupported characterizations, and bald contentions are not well-pleaded allegations and will not defeat a motion to dismiss. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "Where a complaint pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement of relief.'" *Id.* (citing

1 *Bell Atlantic*, 550 U.S. at 557).

2 Defendants argue that the plaintiff's complaint is based on a fictitious contract that has no
3 evidentiary support. Further defendants argue that the plaintiff has admitted to failing to pay the
4 mortgage and is basing her tenuous implied contract argument on a mailer sent to her house, which
5 was intended only to put the plaintiff on notice of ways she might correct the situation.

6 The court agrees. To satisfy the statute of frauds, a contract must contain a note or
7 memorandum including the: (1) names of the parties; (2) terms and conditions; (3) interest of
8 property affected; and (4) consideration to be paid. *Pentax Corp. v. Boyd*, 111 Nev. 1296, 1299-
9 1300 (Nev. 1995). Additionally, any contract for interest in land for a period greater than one year
10 must be in writing and signed by the parties to whom the sale is made. NRS 111.210.

11 Here, the mailer relied on by the plaintiff does not memorialize any consideration to the
12 defendants, nor does it contain a signature of any representative of the defendants. Therefore, the
13 mailer, as pleaded in the complaint, is insufficient evidence of an implied contract and also fails to
14 satisfy the statute of frauds. Whereas plaintiff's claims are each based on the assumption that a valid
15 contract existed between the parties, they must all be dismissed.

16 **2. Motion to Amend Complaint**

17 Under Federal Rule of Civil Procedure 15, a plaintiff may, without leave of court, amend its
18 complaint once within 21 days of service so long as the defendant has not filed an answer. When
19 requested, leave to amend "shall be freely given when justice so requires." FED. R. CIV. P. 15(a).
20 The local rules of federal practice in the District of Nevada qualify this rule, and require that a
21 plaintiff submit a proposed, amended complaint along with a motion to amend. LR 15-1(a).

22 Here, plaintiff filed her complaint (doc. #1-2) on April 29, 2011, and the defendants have
23 filed their answers (doc. #1). Therefore, plaintiff must request leave of the court to file an
24 amendment. However, the plaintiff has not complied with the local rule and attached the proposed,
25 amended complaint. Therefore, the plaintiff's motion to amend must be denied for failure to comply
26 with the local rule.

1 Accordingly,

2 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants Wells Fargo
3 Home Mortgage's and National Default Servicing Corporation's motion to dismiss (doc. #5), is
4 GRANTED. The case is dismissed without prejudice.

5 IT IS FURTHER ORDERED that plaintiff's motion to amend the complaint (doc. #9) is
6 hereby DENIED without prejudice.

7 DATED July 28, 2011.

8
9 
10 **UNITED STATES DISTRICT JUDGE**